

REMARKS

The present Amendment is in response to the Office Action mailed December 16, 2004, in the above-identified application. Enclosed herewith is a Petition requesting a three month extension of time for resetting the deadline for responding to the Office Action from March 16, 2005, to and including June 16, 2005.

In the Office Action, the Examiner rejected claims 1-2 and 4 under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 5,893,889 to Harrington. Referring to FIG. 2 thereof, Harrington discloses a disc implant 18 including an upper member 32 having an upper surface 36 with pins 38 and a lower member 34 having a lower surface 40 with pins 42. The upper member 32 includes a threaded tube 50 that receives a threaded annular collar 54 for securing the annular collar 54 to the upper member 32. The annular collar 54 has a neck 57 that is sized to retain a spherical upper end 46 of a threaded post 45. The disc implant 18 also discloses an annular shock absorbing member 68 that generally conforms to the opposing frusto-conical surfaces of the upper and lower members 32, 34. The device also includes a tubular membrane 78 that is secured to the upper and lower members 32, 34 by respective retaining rings 74, 76. The Examiner asserts that Harrington's tubular membrane 78 is equivalent to Applicants' retaining wall and that the first and second retaining rings 74, 76 are equivalent to Applicants' retaining ring.

As indicated above, Applicants have slightly amended claim 1 to more clearly recite that the convex member 130 (FIG. 6) is retained against the inner face of top plate 100 by the retaining wall 108 and the retaining ring 109. As a result, although the convex element 130 is free to move relative to the first plate 100, the movement of the convex element is limited

to an enclosed area defined by the retaining wall 108 and the retaining ring 109. In response to the Examiner's rejection, Applicants respectfully assert that claim 1 is unanticipated by Harrington because the cited reference does not disclose a spacer device "wherein said convex element is maintained against said first plate member by a retaining wall and a retaining ring." Clearly, Harrington's convex element 54 is maintained against the first plate member 32 by the threaded tube 50, and not the membrane 78 and the retaining rings 74, 76 attached to the membrane. In addition, claim 1 is unanticipated by Harrington because the cited reference neither discloses nor suggests a spacer device whereby "said convex element is held against said first plate member by the retaining ring and the retaining wall." Clearly, Harrington's tubular membrane 78 and the first and second retaining rings 74, 76 do not cooperate to hold the convex element 68 against the first plate member as required by claim 1. For all of these reasons, claim 1 is unanticipated by Harrington and is otherwise allowable. Claims 2 and 4 are unanticipated, *inter alia*, by virtue of their dependence from claim 1, which is unanticipated for the reasons set forth above.

The Examiner also rejected claims 3 and 5-6 under 35 U.S.C. §103(a) as being unpatentable over Harrington in view of U.S. Patent No. 5,989,291 to Ralph et al. In response, Applicants respectfully assert that Ralph does not overcome the deficiencies noted above in Harrington. Thus, claims 3 and 5-6 are unobvious, *inter alia*, by virtue of their dependence from claim 1, which is unobvious for the reasons set forth above.

In the present Amendment, Applicants have added new claims 7-12, which are fully supported by the originally filed specification and add no new matter. New claim 7 is unanticipated by Harrington because the cited reference neither discloses nor suggests a device "wherein the retaining wall is

in contact with and extends away from the first plate surface of said first plate." New claim 8 is unanticipated by Harrington because the cited reference neither discloses nor suggests a device "wherein the retaining wall is in contact with the first plate surface of said first plate." New claim 9 is unanticipated by Harrington because the cited references neither discloses nor suggests a device "wherein the retaining wall has a first diameter and said first plate has an outer perimeter defining a second diameter that is larger than the first diameter." Claim 10 is unanticipated by Harrington because the cited reference neither discloses nor suggests the device "wherein the retaining wall and the retaining ring cooperate for limiting movement of said convex element over the first plate surface of said first plate." Claim 11 is unanticipated by Harrington because the cited reference neither discloses nor suggests a device "wherein the retaining wall is stationary relative to said first plate member and said convex element is movable relative to said first plate member and said retaining wall." Finally, new claim 12 is unanticipated by Harrington because the cited reference neither discloses nor suggests that "the retaining wall and the retaining ring define a substantially enclosed area over said first plate surface of said first plate member and said convex element is movable relative to said first plate member within the enclosed area."

As it is believed that all of the rejections set forth in the Office Action have been fully met, favorable reconsideration and allowance are earnestly solicited.

If, however, for any reason the Examiner does not believe that such action can be taken at this time, it is respectfully requested that he telephone Applicants' attorney at (908) 654-5000 in order to overcome any additional objections which he might have.

Application No.: 10/781,021

Docket No.: SPINE 3.0-436 CIP CONT

If there are any additional charges in connection with this requested Amendment, the Examiner is authorized to charge Deposit Account No. 12-1095 therefor.

Dated: June 7, 2005

Respectfully submitted,

By Michael J. Doherty

Michael J. Doherty

Registration No.: 40,592

LERNER, DAVID, LITTENBERG,

KRUMHOLZ & MENTLIK, LLP

600 South Avenue West

Westfield, New Jersey 07090

(908) 654-5000

Attorney for Applicant

570776_1.DOC